

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
4M of Richmond, Inc., Licensee of WLEE)	File No. EB-02-NF-124
4M Communications, Inc., Owner of Antenna)	
Structure #1231421)	NAL/Acct. No. 200332640001
Richmond, Virginia)	
)	FRN-0003782182

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 2005

Released: August 30, 2005

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny the petition for reconsideration filed by 4M of Richmond, Inc. (“4M of Richmond”), licensee of AM station WLEE, Richmond, Virginia. 4M of Richmond seeks reconsideration of the *Forfeiture Order*¹ issued by the Enforcement Bureau (“Bureau”) on August 13, 2004, in the amount of six thousand six hundred dollars (\$6,600), for willful violation of Section 73.49 of the Commission's Rules (“Rules”) and willful and repeated violation of Section 73.1745(a) of the Rules.² The noted violations involve 4M of Richmond’s failure to enclose its tower within an effective locked fence (§ 73.49) and exceeding its nighttime power limit (§ 73.1745(a)).³

II. BACKGROUND

2. WLEE is licensed to transmit with a daytime power of 1,000 watts and a nighttime power of 13 watts. On August 19, 2002, an agent from the Commission’s Norfolk, Virginia, Resident Agent Office (“Norfolk Office”) inspected WLEE’s transmitter site. At about 1:30 p.m., the agent observed that the gate to the fence surrounding the base of WLEE’s tower had no lock. After sunset on August 19, 2002, the agent observed WLEE’s antenna base current meter, which measured the current supplied to WLEE’s antenna tower, and calculated that WLEE’s power exceeded the station’s authorized nighttime power of 13 watts. On August 20, 2002, the agent inspected a portion of WLEE’s logs for August 17, 18

¹ *4M of Richmond, Inc., and 4M Communications, Inc.*, 19 FCC Rcd 15447 (Enf. Bur. 2004).

² 47 C.F.R. §§ 73.49 and 73.1745(a).

³ The *Forfeiture Order* also imposed a forfeiture of eight thousand dollars (\$8,000) against 4M Communications, Inc. (“4M Communications”), the owner of WLEE’s antenna structure, for willful violation of Section 17.50 of the Rules, 47 C.F.R. § 17.50 (failure to comply with the prescribed antenna structure marking). 4M Communications does not seek reconsideration of that forfeiture.

and 19, 2002. Those logs noted that the use of power between sunset and sunrise on August 17, 18 and 19, 2002, exceeded WLEE's authorized nighttime power of 13 watts on each of those evenings.

3. On November 4, 2002, the Norfolk Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to 4M of Richmond in the amount of \$11,000 for apparent willful violation of Section 73.49 (\$7,000) and apparent willful and repeated violation of Section 73.1745(a) (\$4,000) of the Rules.⁴ In its response to the NAL, filed December 3, 2002, 4M of Richmond sought reduction or cancellation of the proposed forfeiture. On August 13, 2004, the Bureau issued a *Forfeiture Order* which did not cancel the forfeiture but reduced the amount because it found that 4M of Richmond had a history of overall compliance. Additionally, the *Forfeiture Order* found that 4M of Richmond acted in good faith by correcting or attempting to correct its violations of Sections 17.49 and 73.1745(a) of the Rules before being notified of those violations. The *Forfeiture Order* imposed a forfeiture in the amount of \$6,600 against 4M of Richmond for violations of Sections 17.49 and 73.1745(a) of the Rules (reduced from \$11,000 because of history of overall compliance and good faith).⁵ In its petition for reconsideration of the *Forfeiture Order*, 4M of Richmond seeks reduction or cancellation of its \$6,600 forfeiture.

III. DISCUSSION

A. Violation of Section 73.49 of the Rules (Fencing)

1. Background

4. Section 73.49 of the Rules provides that antenna structures that have radio frequency potential (voltage) at the base of the tower must be enclosed within an effective locked fence. The Enforcement Bureau has imposed forfeitures for violation of this rule in numerous cases because of the safety concerns to the public that fencing violations represent.⁶

2. Discussion

5. 4M of Richmond argues that its violation of Section 73.49 of the Rules was "minor" because it lasted for only four days, was not as serious as the violations of other licensees who had no antenna structure fencing⁷ or gaps in the fencing,⁸ and was corrected before the Norfolk Office notified 4M of Richmond of the violation. 4M of Richmond contends that *Kaspar Broadcasting Co. of Missouri*, 14 FCC Rcd 4719 (Enf. Bur. 2004), in which the forfeiture was cancelled, is similar to this case.

⁴ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332640001 (Enf. Bur., Norfolk Office, released November 4, 2002). The NAL was also issued to 4M Communications in the amount of \$10,000 for apparent willful violation of Section 17.50 of the Rules.

⁵ The *Forfeiture Order* also reduced the forfeiture amount to \$8,000 against 4M Communications for repeated and willful violation of Section 17.50 of the Rules (reduced from \$10,000 because of history of overall compliance).

⁶ See, e.g., *Buchanan Broadcasting Company, Inc.*, 15 FCC Rcd 24363 (2000); *East Texas Broadcasting Company, Inc.*, 19 FCC Rcd 22491 (Enf. Bur. 2004).

⁷ *Pittman Broadcasting Services, LLC*, 19 FCC Rcd 15320 (Enf. Bur. 2004).

⁸ *Commonwealth License Subsidiary, LLC*, 18 FCC Rcd 20483 (Enf. Bur. 2003).

6. We disagree. The cases are not, in fact, similar. In *Kaspar*, the gate to the enclosure around the station's antenna structure was open for 30 minutes to facilitate repairs, while in the instant case the gate was left unlocked for four days. Moreover, the fact that sanctions in other cases were imposed for longer-lasting fencing violations is not dispositive.⁹ As we previously found in the *Forfeiture Order*, a duration of "only" four days does not make 4M of Richmond's violation of Section 73.49 "minor."¹⁰ Given the fact that the gate to the fence was unlocked and the radiating antenna structure was thus accessible to anyone over a four day period, we find that 4M of Richmond's fencing violation cannot be characterized as minor. 4M of Richmond corrected the fencing violation before the Norfolk Office notified it of the violation, thus warranting a reduction for good faith. We note, however, that the forfeiture amount (\$4,200) imposed by the *Forfeiture Order* for violation of Section 73.49 already reflects this reduction. We conclude that no further reduction in the forfeiture amount imposed for violation of Section 73.49 of the Rules is merited.

B. Violation of Section 73.1745(a) of the Rules (Excessive Power).

1. Background

7. Section 73.1745(a) of the Rules prohibits broadcast licensees from operating with power other than that specified by their licenses. WLEE is licensed to operate with a power of 1,000 watts during the day and a power of 13 watts between sunset and sunrise. The Enforcement Bureau has imposed forfeitures for violation of this rule in numerous cases as a licensee is expected to operate in a manner consistent with its license.¹¹

2. Discussion

8. 4M of Richmond asserts that the *Forfeiture Order* is not clear as to whether its violation of Section 73.1745(a) of the Rules is for operating with 37, 39, 940 or 945 watts. 4M of Richmond argues that its operation with 940-945 watts should not be considered in this proceeding because the *NAL* did not notify it that the station had operated at those power levels. Additionally, 4M of Richmond argues "an excess nighttime power of 26 watts for no more than three (3) days is 'minor'" and "far less egregious" than violations by other licensees who operated "with day time power levels for long periods of time."¹² Finally, 4M of Richmond claims that because the *NAL* did not specify the excess power levels, 4M was

⁹ See *FBS Wireless Corporation*, 18 FCC Rcd 21018 (Enf. Bur. 2003) *petition for reconsideration pending*; *Truth Broadcasting Corporation*, 17 FCC Rcd 24376 (Enf. Bur. 2002).

¹⁰ *Forfeiture Order at 15449*.

¹¹ See e.g. *Johnson Enterprises*, 19 FCC Rcd 14457 (Enf. Bur. 2004); and *Union Broadcasting, Inc.*, 19 FCC Rcd 18588 (Enf. Bur. 2004).

¹² 4M of Richmond cites *FTP Corporation*, 19 FCC Rcd 15350 (Enf. Bur. 2004) and *Horne Radio, LLC*, 19 FCC Rcd 6055 (Enf. Bur. 2004) as examples. Nothing in these cases, however, establishes that 4M of Richmond's overpower violations were minor. In both *FTP* and *Home Radio*, FCC agents observed overpower operation on two occasions. By contrast, FCC agents observed overpower operation by 4M of Richmond over a three day period. Furthermore, even a single episode of overpower operation is sufficient to warrant imposition of the full \$4,000 base forfeiture amount. See, e.g., *Pilgrim Communications, Inc.*, 19 FCC Rcd 8877 (Enf. Bur. 2004), *application for review pending*.

not given appropriate notice until the *Forfeiture Order* containing those specific power levels was issued. Thus, 4M of Richmond argues, the Commission cannot impose a forfeiture in this case because 4M of Richmond did not receive notice of a specific violation until more than one year after the violation occurred, which is prohibited by the Commission's Rules.¹³

9. We reject 4M of Richmond's arguments. We found in the *Forfeiture Order* that WLEE was operating, at various times, with 37, 39, 940 or 945 watts. The *NAL* notified 4M of Richmond that WLEE's power exceeded the authorized nighttime power "by at least 200% on August 17, 18 and 19, 2002" and 4M of Richmond's own logs indicated that it operated at excessive power levels on these dates.¹⁴ As indicated above, WLEE's nighttime power was near its authorized daytime level after sunset on August 18, 2002, and before sunrise on August 19, 2002 – over 70 times the authorized level. Even WLEE's operation at a power level of 37-39 watts on the evenings of August 17 and 19 was close to three times the authorized level.¹⁵ We find that 4M of Richmond's violations of Section 73.1745(a) of the Rules cannot be characterized as minor and that no further reduction in the \$2,400 forfeiture amount imposed for violation of Section 73.1745(a) is warranted.

10. Finally, as to 4M of Richmond's notice argument, as stated above, the *NAL* gave 4M of Richmond sufficient as well as timely notice of the extent of its excess power levels on the nights of August 17, 18, and 19, 2002.¹⁶

11. We have examined the 4M of Richmond's petition for reconsideration of the *Forfeiture Order* pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,¹⁷ and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.¹⁸ As a result of our review, we conclude that no further reduction is warranted and that the appropriate amount for the forfeiture is \$6,600.

¹³ Under 47 U.S.C. § 503(b)(6)(A), in the case of broadcast licensees, a forfeiture cannot be imposed if the violation charged occurred "more than 1 year prior to the date of issuance of the required notice or notice of apparent liability," or "prior to the date of commencement of the current term of such license, whichever is earlier." Since the *NAL* was issued on November 4, 2002, within one year following the August 2002 violation and well before the expiration of the license term, the *NAL* was issued in a timely manner. *See, e.g., KM Radio of St. Johns, L.L.C.* 19 FCC Rcd. 5847 (2004) (finding that, while the Commission was barred from issuing an *NAL* for unauthorized construction that occurred prior to commencement of the station's current license term, the Commission was not barred from issuing a timely *NAL* for unauthorized operation occurring within the current license term).

¹⁴ The Norfolk Office agent reported that WLEE's station logs showed the following reading: a) Saturday, 8/17/02, from 12:10 AM to 6:32 PM: 26-28 W; b) Saturday, 8/17/02, from 8:02 PM to 9:10 PM: 30-37 W; c) Sunday, 8/18/02, from 8:10 PM to 11:10 PM: 937-945 W; d) Monday, 8/19/02 from 12:10 AM to 6:10 AM: 933-940 W; and e) Monday, 8/19/01 from 8:02 PM to 9:56 PM: 27-37 W.

¹⁵ AM stations must not operate with over 105% of authorized power no matter the mode of operation. *See* 47 C.F.R. § 73.1560.

¹⁶ *See Notice of Apparent Liability for Forfeiture*, *NAL/Acct. No. 200332640001* (Enf. Bur., Norfolk Office, released November 4, 2002) at ¶ 4.

¹⁷ 47 U.S.C. § 503(b)(2)(D).

¹⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Rules,¹⁹ 4M of Richmond's petition for reconsideration of the *Forfeiture Order* **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

13. Payment of the forfeitures shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁰ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²¹

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to 4M of Richmond, Inc., and 4M Communications, Inc., 308 Broad Street, Richmond, Virginia 23220 and to their counsel, Stephen T. Yelverton, Yelverton Law Firm, P.L.L.C., 601 Pennsylvania Avenue, NW, Suite 900 South, Washington, DC 20004.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief, Enforcement Bureau

¹⁹ 47 C.F.R. § 1.115(g).

²⁰ 47 U.S.C. § 504(a).

²¹ See 47 C.F.R. § 1.1914.